IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 7TH JUNE 2007 / 17TH JYAISHTA 1929

O.T.Appeal.No.13 of 2006

(AGAINST ORDER NO.C7.34151/2006 DATED 25.10.2006 OF THE COMMISSIONER OF COMMERCIAL TAXES, THIRUVANANTHAPURAM)

.....

APPELLANT:-

M/S.M.P. AGESNCIES, PARIS ROAD,
KANDANASSERY P.O., THRISSUR-680 102.

BY ADV. SRI.G.SHIVA DASS
SRI.SHAJI THOMAS PORKKATTIL
SRI.BINU PAUL

RESPONDENT:-

STATE OF KERALA.

BY SPECIAL GOVERNMENT PLEADER (TAXES) SRI.V.V.ASHOKAN.

THIS OTHER TAX APPEAL HAVING BEEN FINALLY HEARD ON 07/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

H.L.Dattu,C.J. & K.T.Sankaran,J.

O.T.Appeal No.13 of 2006

Dated, this the 7th day of June, 2007

JUDGMENT

H.L.Dattu,C.J.

The appellant before us is a dealer registered under the Kerala Value Added Tax Act, 2003 ("Act" for short). The appellant is the distributor of "Ujala Supreme" and "Ujala Stiff & Shine". They are the brand names of M/s.Jyothy Laboratories Limited, Panissery, Koonamoochy P.O., Thrissur. The appellant purchases these products and effects sale to the wholesalers and the wholesalers thereafter effects sale to retailers.

2. After introduction of the Act, the assessee filed an application under Section 94 of the Act read with Rule 78 of the Rules before the Commissioner of Commercial Taxes with a request to clarify whether they are justified in selling the aforesaid two products at 4% under the Act. Along with their application, they had produced the details of the products and also the test results of Bombay Textile Research Association, Mumbai, the expert opinion from Institute of Chemical Technology, University of Mumbai, etc.

3. The Commissioner of Commercial Taxes, after hearing the representative of the assessee, has passed an order dated 25.10.2006. In that it was stated as under:

> "M/s.M.P.Agencies, Trissur has filed an application for clarification u/s.94 of KVAT Act 03 requesting to clarify the rate of tax on "Ujala Supreme" and "Ujala stiff and shine".
>
> Authorised Representative of the applicant was heard, and the contentions of the applicant were examined in detail. The items "Ujala Supreme" and "Ujala stiff and shine" are commercially known as instant whiteners. The consumers are purchasing the commodity for their ultimate use. Admittedly, the Raw Material purchased by the manufacturer are subjected to certain processes and are marked as a commercially different commodity, "instant

> whitener", in the brand name "Ujala", which is used as a laundry whitener at the end point.
>
> As per SRO 82/06, Government have notified list of commodities coming under 12.5% category and laundry brighteners have been brought under this category vide entry 27. Since there is a specific entry for the commodity as above, it will rightly fall under the said entry, taxable at 12.5%.
>
> The point raised are clarified accordingly".

4. Sri.G.Shiva Dass, learned counsel appearing for the appellant, apart from others, would submit that the Commissioner without adverting to any one of the contentions canvassed by the assessee's representative and without considering any one of the clarifications, expert's opinion, report of Research Association, etc., has proceeded to pass the impugned order. Therefore, it is contended that the said order is violative of Articles 14, 19 and 21 of the Constitution and also arbitrary, capricious, etc.

5. Sri.V.V.Ashokan, learned Special Government Pleader (Taxes) would submit, by referring to the commodity, that the Commissioner is justified in holding that the sale effected by the assessee is exigible to tax at 12.5%.

6. Application for clarification can be filed under Section 94 of the Act. An assessee can seek clarification as to whether, for the purpose of the Act, any person is a dealer; any transaction is a sale; any particular dealer is required to be registered; any tax is payable in respect of any sale or purchase, or if tax is payable, the point and the rate thereof; or any activity carried out in any goods amounts to or results in the manufacture of goods.

7. Sub-section (2) of Section 94 of the Act envisages that the Commissioner shall, after giving the parties to the dispute a reasonable opportunity to put forward their case and produce evidence and after considering such evidence and hearing the parties, pass appropriate orders.

The said section is relevant for the purpose of this case. Therefore, the same is extracted. It reads as under:

> "The Commissioner shall decide the question after giving the parties to the dispute a reasonable opportunity to put forward their case and produce evidence and after considering such evidence and hearing the parties".

8. In the instant case, an application came to be filed by the assessee, *inter alia*, seeking a clarification from the Commissioner as to whether they are justified in selling their products, viz., "Ujala Supreme" and "Ujala Stiff and Shine", at 4% under the Act. It is an admitted position that along with their application, they had produced before the Commissioner enough and more evidence in support of that claim, including the test reports from a reputed laboratory and also an opinion from the Institute of Chemical Technology.

9. The assessee also had appeared before the Commissioner of Commercial Taxes.

10. Under sub-section (2) of Section 94 of the Act, apart from affording an opportunity of hearing to the parties and producing evidence before him, the Commissioner is expected to consider such evidence and pass appropriate orders.

11. In the instant case, the Commissioner without even adverting to any one of the evidence produced by the assessee, by merely relying upon how the commodity is understood in the commercial circles, has proceeded to observe that the sale of the products by the assessee requires to be taxed at 12.5%. This view of the Commissioner is contrary to sub-section (2) of Section 94 of the Act.

12. The orders passed by the Commissioner under Section 94

of the Act is not only binding on the assessee, but also binding on the assessees who are similarly placed. Further, it is binding on the assessing authority. In cases of this nature, it is expected of the Commissioner to deal with the subject which is before him for clarification in detail and then offer his opinion by way of an order. In the instant case, the Commissioner has not done that exercise. This action of the Commissioner, in our opinion, is arbitrary, illegal and improper. Therefore, the order passed by the Commissioner requires to be set aside and the matter requires to be remitted back to the Commissioner for a fresh decision, keeping in view the observations made by us in the course of the order. Accordingly, the following:

Order

(i) The appeal is allowed.

(ii) The impugned order passed by the Commercial Taxes dated 25.10.2006 is set aside.

(iii) The matter is remitted back to the Commissioner of Commercial Taxes to redo the matter in accordance with law after adverting to the evidence produced by the appellant in support of its case and claim.

(iv) All other contentions of the parties are left open.

Ordered accordingly.

Consequently, I.A.No.3527 of 2006 is dismissed.

H.L.Dattu
Chief Justice

K.T.Sankaran
Judge

vku/DK.